EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

NO. 85-5534

Supreme Court, U.S.
FILED
NOV 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

WILLIAM "BILLY" MITCHELL,

Petitioner,

v.

RALPH KEMP, SUPERINTENDENT,
GEORGIA DIAGNOSTIC &
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SUSAN V. BOLEYN
Assistant Attorney General
Counsel of Record for Respondent.

MICHAEL J. BOWERS
Attorney General

MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

Please Serve:

SUSAN V. BOLEYN
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334

QUESTIONS PRESENTED

I.

Whether the Eleventh Circuit properly applied Strickland v. Washington, ___ U.S. ____, 104 S.Ct. 2052, by finding that under the totality of the circumstances Petitioner's trial attorney was not ineffective for failing to present character witnesses at Petitioner's sentencing trial?

II.

Whether the Eleventh Circuit properly determined that there was sufficient evidence to support the aggravating circumstance upon which Petitioner's death sentence was based, even excluding evidence produced from Petitioner's confessions?

III.

Whether the Eleventh Circuit properly denied a challenge by Petitioner to the application of the Georgia death penalty statute, finding that the statistical evidence offered did not support a finding that the death penalty was arbitrary and racially discriminatory?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF FACTS	1
REASONS FOR NOT GRANTING THE WRIT	
I. THE ELEVENTH CIRCUIT PROPERLY APPLIED THE STANDARDS OF STRICKLAND V. WASHINGTON, ___ U.S. ____, 104 S.CT. 2052 (1984), IN REJECTING PETITIONER'S CLAIM THAT COUNSEL WAS INEFFECTIVE AT THE PETITIONER'S SENTENCING TRIAL DUE TO COUNSEL'S FAILURE TO PRESENT "CHARACTER WITNESSES" IN LIGHT OF THE TOTALITY OF THE CIRCUMSTANCES	4
II. THE ELEVENTH CIRCUIT PROPERLY DETERMINED THAT THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH THE AGGRAVATING CIRCUMSTANCES WHICH SUPPORTED PETITIONER'S DEATH SENTENCE EVEN IN THE ABSENCE OF EVIDENCE OBTAINED BY PETITIONER'S CONFESSIONS AND THEREFORE, PETITIONER HAS NOT ESTABLISHED THAT HIS DEATH SENTENCE RESTED ON AN UNCONSTITUTIONALLY COERCED CONFESSION	14
III. THE ELEVENTH CIRCUIT HAVING CLEARLY REJECTED THE ARGUMENT THAT THE GEORGIA DEATH PENALTY STATUTE IS APPLIED IN A RACIALLY DISCRIMINATORY MANNER, NO WRIT OF CERTIORARI SHOULD BE GRANTED FOR A REVIEW OF THIS ISSUE	16
CONCLUSION	17
CERTIFICATE OF SERVICE	18

TABLE OF AUTHORITIES

	Page(s)
McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc).....	16
McCleskey v. Kemp, Case No. 84-6811.....	3
McMann v. Richardson, 397 U.S. 759 (1970).....	14
Mitchell v. Hopper, 239 Ga. 781, 239 S.E.2d 2 (1977).....	2
Mitchell v. Hopper, 538 F.Supp. 77 (S.D.Ga. 1982).....	3
Mitchell v. Hopper, 564 F.Supp. 780 (S.D.Ga. 1983).....	2, 3
Mitchell v. Kemp, 762 F.2d 887 (11th Cir. 1985).....	3, 11, 12, 14
Mitchell v. State, 234 Ga. 160, 214 S.E.2d 900 (1975).....	2
Ross v. Hopper, Civil Action No. CV478-162.....	2
Spencer v. Zant, Civil Action No. CV179-247.....	2
Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052 (1984).....	i, ii, 4, 5, 6, 12
Zant v. Stephens, 462 U.S. 862, 77 L.Ed.2d 235 (1983).....	15
Statutes Cited:	
28 U.S.C. § 2254.....	2

NO. 85-5534

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

WILLIAM "BILLY" MITCHELL,

Petitioner,

v.

RALPH KEMP, SUPERINTENDENT,
GEORGIA DIAGNOSTIC &
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE FACTS

Petitioner, William "Billy" Mitchell, pled guilty to the murder of fourteen year-old Christopher Carr. The evidence, briefly stated, shows that during the course of an armed robbery, Petitioner Mitchell marched the young victim and the victim's mother, at gun point, to the cooler of the store where they worked. While the boy's mother watched, Petitioner Mitchell shot Christopher Carr to death. Petitioner then shot Carr's mother four times, twice in the head. Somehow, Mrs. Carr survived the attempted murder and identified Petitioner as her assailant and her son's murderer.

The day following the murder, counsel was appointed to represent Mitchell. On November 4, 1974, approximately four months after the appointment of counsel, Petitioner was arraigned and entered a plea of not guilty. Petitioner's case was set for trial the following day, both sides having

announced ready. On November 5, 1974, Petitioner withdrew his plea of not guilty and pled guilty to the offense of murder. The plea was accepted and a pre-sentence hearing was set for the same afternoon. Following that hearing, Petitioner was sentenced to death.

Petitioner's trial attorney filed a notice of appeal on Petitioner's behalf, but before trial counsel could take any further action, Petitioner retained other counsel to represent him.

On appeal to the Supreme Court of Georgia, the Supreme Court affirmed the judgment of the trial court in Mitchell v. State, 234 Ga. 160, 214 S.E.2d 900 (1975). Next, Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Tattnall County, Georgia. A hearing was conducted in that court in January of 1977. By order of the court dated April 6, 1977, the state habeas corpus petition was denied. The Supreme Court of Georgia affirmed the denial of state habeas corpus relief in Mitchell v. Hopper, 239 Ga. 781, 239 S.E.2d 2 (1977).

Petitioner filed an application for habeas corpus relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of Georgia, Savannah Division, on June 12, 1978. This petition was amended on June 14, 1978. A motion for discovery filed on behalf of Petitioner was granted on October 24, 1979.

An evidentiary hearing was scheduled in the case in May of 1981. At the direction of the court, all parties filed supplemental briefs following the conclusion of the evidentiary hearing.

On April 14, 1982, the district court entered an order in Petitioner's case, along with the cases of Willie X. Ross v. Hopper, Civil Action No. CV478-162 and James Lee Spencer v. Zant, Civil Action No. CV179-247. However, the district court also ordered a further hearing to take place with reference to Petitioner's claim of ineffective assistance at the sentencing

phase of his trial. Following this hearing, the parties presented post-hearing memoranda on this issue.

On June 7, 1983, the district court found Petitioner's claim of ineffective assistance of counsel at the sentencing phase to be without merit and denied Petitioner's application for a writ of habeas corpus, having concluded that all other grounds alleged as the basis for the granting of habeas corpus relief were without merit.

The orders of the United States District Court for the Southern District of Georgia are contained in Mitchell v. Hopper, 538 F.Supp. 77 (S.D.Ga. 1982) and Mitchell v. Hopper, 564 F.Supp. 780 (S.D.Ga. 1983).

Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit and following oral argument on January 31, 1984, the Eleventh Circuit withheld decision in the case until the en banc decision of the court in McCleskey v. Kemp, 753 F.2d 877 (11th cir. 1985) (en banc). The Eleventh Circuit affirmed the denial of federal habeas corpus relief in Mitchell v. Kemp, 762 F.2d 887 (11th Cir. 1985). Petitioner's petition for rehearing in the Eleventh Circuit was denied on July 11, 1985. Petitioner then appealed to this Court by means of filing a petition for a writ of certiorari. Further references to the procedural history of this case will be made as is necessary for a discussion of the issues raised by means of the petition for a writ of certiorari.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT PROPERLY APPLIED THE STANDARDS OF STRICKLAND V. WASHINGTON, ___ U.S. ____, 104 S.CT. 2052 (1984), IN REJECTING PETITIONER'S CLAIM THAT COUNSEL WAS INEFFECTIVE AT THE PETITIONER'S SENTENCING TRIAL DUE TO COUNSEL'S FAILURE TO PRESENT "CHARACTER WITNESSES" IN LIGHT OF THE TOTALITY OF THE CIRCUMSTANCES.

Petitioner contends that the Eleventh Circuit improperly applied this Court's decision in Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052 (1984), in rejecting Petitioner's claim that his counsel's failure to present character evidence at the Petitioner's sentencing trial, rendered him ineffective. In Strickland v. Washington, supra, this Court set forth the following guidelines for reviewing claims of ineffective assistance:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a

> trial whose result is reliable. Unless the defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversarial process that renders the result unreliable.

Strickland v. Washington, supra, at 2064.

This Court also noted that, "in any case presenting an ineffectiveness claim, performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 2065. This Court found that:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. (Cites omitted).

Id.

This Court also found that there must be a presumption that counsel's conduct "falls within the wide range of reasonable professional assistance." Strickland v. Washington, supra at 2066.

Respondent respectfully submits that when the circumstances surrounding Petitioner's entering of a guilty plea and subsequent sentencing hearing are reviewed, that the Eleventh Circuit correctly applied Strickland v. Washington, supra in finding that trial counsel's performance was within the scope of reasonable effective assistance. This Court defined the task of reviewing courts as being to ". . . determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally

competent assistance." Id. This Court found that a reviewing court ". . . should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id, at 2066.

Petitioner's basic claim of ineffective assistance was that during the sentencing trial accorded to Petitioner following his guilty plea, Petitioner's attorney should have presented evidence concerning Petitioner's "good character," by calling to the stand family members and friends who could have testified as to Petitioner's behavior as a young person. At first glance, the failure to present evidence of good character during the sentencing trial of a person against whom the death sentence is sought might seem to cause a reviewing court making a performance inquiry to be concerned over whether counsel's actions were reasonable. However, the circumstances in this case, serve to illustrate why it is necessary in evaluating ineffective assistance claims to view the totality of the circumstances in making the two-pronged inquiry set forth by this Court in Strickland v. Washington, supra.

In making a review of the question of ineffective assistance of counsel in this case, it is important to note that the question of effective assistance was fully litigated in both the state courts and the federal courts. Mr. Clarence A. Miller, Petitioner's trial attorney, testified at the state habeas corpus hearing held in the Superior Court of Tattnall County, Georgia on January 28, 1977. Additionally, Mr. Miller testified extensively in the federal district court on April 17, 1982 and on May 18, 1982. The record of the second evidentiary hearing held in the district court also reveals that Mr. Miller was subpoenaed for a deposition in Worth County, Georgia on December 4, 1979.

In reviewing the testimony of Mr. Miller, the district court cited the exceptional nature of Petitioner as a criminal defendant as one of two "significant factors" limiting the

range of choices open to Mr. Clarence Miller, who represented Petitioner at his guilty plea and at the sentencing trial. The first "significant factor" noted by the district court as affecting Mr. Miller's representation of the Petitioner is the fact that the evidence against the Petitioner was "overwhelming." As the district court noted, Petitioner's trial attorney fully investigated the facts surrounding the crime. Mr. Miller testified that he followed the case from the day after Mr. Mitchell's arrest, observing Petitioner's positive identification by two eyewitnesses in a lineup. Mr. Miller also stated that he had interviewed practically all of the State's witnesses, had access to Petitioner's confessions, the Crime Lab's report, the two weapons involved and the ballistics report identifying the two bullets taken from the deceased as matching Petitioner's gun. Mr. Miller also stated that Petitioner freely told him the same material as was contained in Petitioner's confessions.

Mr. Miller testified at the state habeas corpus hearing that Petitioner had admitted to him that he had shot the murder victim, as well as the victim's mother and had forcibly taken money at gunpoint from the store where the victims were working. As is evident from the transcript of the guilty proceeding, Mr. Miller was faced with the eyewitness testimony of the victim's mother. Mr. Miller knew that if he proceeded to trial with Petitioner, he would be faced with a witness who could remove her wig and show the jury a shaved skull with scars and depressions in the skull, resulting from bullet wounds.

Mr. Miller stated that at his first convenient opportunity, he had a lengthy interview with the Petitioner and inquired about Petitioner's background, his education and any physical ailments or problems. With respect to the unusual nature of the Petitioner as a criminal defendant, Mr. Miller testified:

> . . . he impressed me as understanding very well, perhaps better than ninety-nine percent of criminal clients that I have had. . . . that his understanding was so thorough that uh, his attitude, however, seemed quite cynical and frankly I had some concerns throughout the time that Mr. Mitchell might get on the stand at a jury trial and proceed to indict society . . . . And his attitude at that time was not one of subduedness (sic) rather one of extreme boldness and self-justification taking all those things into account, uh, viewing the real evidence which was recovered, the, uh, two pistols, viewing the reports from the Crime Lab. Uh, all of these things were readily accessible to me without discovery or . . without any hardships or delay, uh, on my part. These were all available to me and, uh, thorough discussions, lengthy continuing discussions of Mr. Mitchell's desires, what would be in his best interests, right on up until the very end . . .

(Record in the Eleventh Circuit, Vol. I, p. 113-114).

Mr. Miller also stated, "Mr. Mitchell was the exceptional case among criminal defendants I represented. Other than to give him an opinion on what I thought to be a knowledge of certain laws, his rationalization, his awareness, his cause and effect, I considered equal to my own." (Record on appeal to the Eleventh Circuit, Vol. V, p. 43). At the time Petitioner pled guilty, Petitioner indicated he had completed two and one half years of junior college. Mr. Miller stated that Petitioner was "very intelligent" and had no problem

understanding the proceedings or his options. (R., Vol. V, p. 30-31). Mr. Miller testified that Mr. Mitchell was in the top two percent of all persons whom he had represented in criminal trials as far as their inherent intelligence. Because of the unique nature of Petitioner as a client, Mr. Miller stated, "I tried to be guided by what a large extent Mr. Mitchell himself said he wanted to do." (R., Vol. V, p. 30). Mr. Miller stated ". . . every thought I had, I share with Mr. Mitchell and, I had told him it was his case, and I would not attempt to dictate to him. I would give him my best advice." (R. Vol. V, p. 32).

Contrary to the assertions made in the petition for a writ of certiorari, Mr. Miller did consider the possibility of obtaining a psychological evaluation of the Petitioner, but rejected this possibility based on the following impressions of the Petitioner:

> . . . his demeanor, his behavior, every impression he made on me totally negatived [sic] any possibility in my mind that he had an irrational streak, or any unusual manifestation of anything that I could recognize. I was totally persuaded that he was a rational person. He was an intelligent person, that he had good communication skills and, I saw nothing from my discussions [sic] meetings with him to suggest any evaluation by psychiatrists could have any bearing on the case. (R. Vol. V, p. 13).

With this background, it can easily be seen how Petitioner's position concerning the conduct of the sentencing trial, was paramount to the actions which Mr. Miller took or did not take, at the direction of Petitioner. First, Mr. Miller discussed the possibility of Petitioner testifying in

his own behalf at the sentencing trial. Mr. Miller repeatedly stated that Petitioner chose not even to testify at the sentencing hearing. (Record on appeal, Vol. V, p. 38). Therefore, Petitioner's own testimony was not available for presentation at the sentencing hearing.

However, contrary to Petitioner's assertion in the petition for a writ of certiorari, Mr. Miller did plan for the sentencing hearing. Petitioner entered his guilty plea on November 5, 1974; the court was recessed until 2:00 p.m. at which time the sentencing phase was scheduled to begin. Mr. Miller stated that he spent a substantial amount of the interval between the guilty plea and the sentencing hearing in conversation with the Petitioner. (Record on appeal, Vol. V, p. 46-47).

During the interval between the plea of guilty and the sentencing hearing, Mr. Miller told Petitioner that he would have the opportunity to tell the court anything he would like to, including anything about remorse, his background, explanations or anything else he wished to say in his own behalf. (R., Vol. V, p. 47-48). Mr. Miller informed his client that except for his argument and any testimony which the Petitioner might elect to give, they would not seek to introduce evidence. Petitioner's trial counsel did not seek to introduce evidence in the form of character type evidence from family members and friends because he had been instructed by Petitioner not to call family members on the question of mitigation. (R., Vol. V, p. 48).

Mr. Miller testified before the district court that Petitioner himself had provided Mr. Miller with an extensive personal history including information about Petitioner's health, his school records and his family. (R., Vol. V, p. 26; 33-34; 57). Mr. Miller stated that Petitioner informed his attorney that he had a good family but that he, the Petitioner, was the "black sheep." (R., Vol. V, p. 33). Mr. Mitchell informed his attorney that he came from a family which was hard

working, although not wealthy, and that none of his family had problems with the law. (R., Vol. V, p. 33). Petitioner told Mr. Miller that he had no known physical or mental defects and that he had pursued his education through the third year of college. Mr. Mitchell told his attorney the colleges he had attended and in fact, Mr. Miller stated that Petitioner was very "candid" in revealing background information. (R., Vol. V, p. 33-34). Therefore, contrary to the assertions of Petitioner made in the petition for a writ of certiorari, Mr. Miller had a complete picture as far as education and family background from the Petitioner himself.

With regard to contacting other persons who could give information about Petitioner's background, Mr. Miller stated before the district court that Petitioner discouraged him from probing into his home town for friends, relatives or school teachers who might testify in Petitioner's behalf at the sentencing phase of the trial. Mr. Miller stated that he was unsure as to what motivated the Petitioner to discourage him in this way, but that he was "continually discouraged" from probing into such matters. (R., Vol. V, p. 33).

However, as the Eleventh Circuit noted, " . . . Mitchell's attorney did not blindly follow Mitchell's command to leave his family out of it. Although it appears the attorney did not probe deeply into Mitchell's reasons for not wishing to involve his family, the attorney made an independent evaluation of the usefulness of character witnesses by an in-depth conversation with Mitchell." Mitchell v. Kemp, 762 F.2d 886, 890 (11th Cir. 1985). Mr. Miller stated that even though Petitioner did not want his attorney to involve his family at all in the case, Mr. Miller made two phone calls to Petitioner's father. (R., Vol. V, p. 37). Mr. Miller testified that no member of Petitioner's family ever contacted him and volunteered information, nor did any family member offer assistance to Mr. Miller or Petitioner. (R., Vol. V, p. 37). Mr. Miller stated unequivocally before the district court that he considered

using family members and other similar witnesses to present mitigating evidence at the sentencing hearing, along with anything else he could think of. (R., Vol. V, p. 37). However, Mr. Miller stated that Petitioner continually suggested that he "leave his father out of it" and that he "leave his family out of it." (R., Vol. V, p. 42).

Based on all of the above and foregoing testimony from Mr. Miller, the Eleventh Circuit was correct in concluding the following under the standard of Strickland v. Washington, supra:

> Considering all the circumstances, including the information the attorney learned from Mitchell, Mitchell's directions, and Mitchell's father's indifference, the attorney acted reasonably when he decided not to pursue an investigation independent of Mitchell and his father.

Mitchell v. Kemp, supra at 890.

The Eleventh Circuit also properly concluded:

> Moreover it was reasonable for the attorney to assume that the presentation of good character evidence might motivate the State to introduce Mitchell's prior conviction when it might not be introduced otherwise, even though it had the right to present the conviction in the absence of mitigating character witnesses.

Id.

Based on a review of the totality of the circumstances, Respondent submits that Petitioner clearly could not establish either the performance or prejudice prong of this Court's test for reviewing allegations of ineffective assistance in Strickland v. Washington, supra and that the Eleventh Circuit properly reviewed the totality of the circumstances and applied

this Court's test in finding that counsel's actions were reasonable and strategical at the time of Petitioner's sentencing trial. This contention by Petitioner presents no issue concerning which a writ of certiorari should issue.

II. THE ELEVENTH CIRCUIT PROPERLY DETERMINED THAT THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH THE AGGRAVATING CIRCUMSTANCES WHICH SUPPORTED PETITIONER'S DEATH SENTENCE EVEN IN THE ABSENCE OF EVIDENCE OBTAINED BY PETITIONER'S CONFESSIONS AND THEREFORE, PETITIONER HAS NOT ESTABLISHED THAT HIS DEATH SENTENCE RESTED ON AN UNCONSTITUTIONALLY COERCED CONFESSION.

Petitioner pled guilty to the offense of murder. Petitioner was sentenced to death based on a finding that Petitioner had murdered Christopher Carr during the commission of an armed robbery and an aggravated assault. As the Eleventh Circuit noted, "the State proved aggravating circumstances in the murder of Christopher Carr by the admission of Mitchell's confession and through Mrs. Carr's testimony." Mitchell v. Kemp, supra at 890. Petitioner now claims that his death sentence is unconstitutional because it allegedly rests, at least in part, on what he contends were coerced confessions.

First, it should be noted that Petitioner has waived his right to attack the voluntariness of his confessions by entering a voluntary and intelligent guilty plea. See McMann v. Richardson, 397 U.S. 759, 769 (1970). The facts surrounding the giving of the statements were testified to during the sentencing hearing of Petitioner in the Superior Court of Worth County. The law enforcement authorities who were present at the time Petitioner gave his statements testified before the court at the sentencing hearing. Both the district court and the state habeas corpus court found that the confessions were voluntary, even assuming Petitioner had not waived the issue by pleading guilty.

However, the eyewitness testimony of Mrs. Carr indicated that Petitioner had committed an armed robbery and an

aggravated assault upon her and therefore, even if Petitioner had given no confessions or if the confessions given were excluded due to any finding of involuntariness, the aggravating circumstance relied upon by the sentencing court could have been fully found from the eyewitness testimony of Mrs. Carr. Under Georgia law, the sentencer need only find one statutory aggravating circumstance in order to impose the death penalty and need not make further findings of fact or any other evidentiary conclusions. See Zant v. Stephens, 462 U.S. 86', 77 L.Ed.2d 235 (1983).

Therefore, under Georgia law, the sentencer having found one statutory aggravating circumstance to exist on the basis of eyewitness testimony, the imposition of the death penalty was proper. Petitioner waived any right he might have had to attack the confessions as being coerced, by means of his prior guilty plea to the charge of murder. This issue presents no basis for the granting of the writ of certiorari to Petitioner.

III. THE ELEVENTH CIRCUIT HAVING CLEARLY REJECTED THE ARGUMENT THAT THE GEORGIA DEATH PENALTY STATUTE IS APPLIED IN A RACIALLY DISCRIMINATORY MANNER, NO WRIT OF CERTIORARI SHOULD BE GRANTED FOR A REVIEW OF THIS ISSUE.

Respondent submits that the filing of a petition for a writ of certiorari in McCleskey v. Kemp, Case No. 84-6811 does not provide a basis upon which to grant a writ of certiorari to Petitioner Mitchell. In McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc), the Eleventh Circuit rejected an attempt to demonstrate with statistical evidence a contention that the death penalty in Georgia is applied in an arbitrary and discriminatory manner.

In McCleskey v. Kemp, the Eleventh Circuit found that, "We affirm the district court on the ground that, assuming the validity of the research, it would not support a decision that the Georgia law was being unconstitutionally applied, much less would it compel such a finding . . . ." McCleskey v. Kemp, supra at 886. The Eleventh Circuit also stated that the court would "assume without deciding that the Baldus study is sufficient to show what it purports to reveal as to the application of the Georgia death penalty." Id. at 895. The court stated that "it would seem that the statistical evidence presented here, assuming its validity, confirms rather than condemns the system." Id. at 899. As this attack on the validity of Georgia's death penalty statute has clearly been rejected, Respondent submits that no petition for a writ of certiorari should be granted to this Petitioner. Respondent relies on the more extensive argument set forth in the brief filed on behalf of the Respondent in McCleskey v. Kemp, Case No. 84-6811.

CONCLUSION

For all of the above and foregoing reasons, Respondent submits that Petitioner has presented no issues of paramount importance which would require the granting of a writ of certiorari.

Respectfully submitted,

SUSAN V. BOLEYN 065850
Assistant Attorney General
Counsel of Record for Respondent

MICHAEL J. BOWERS 071650
Attorney General

MARION O. GORDON 302300
First Assistant Attorney General

WILLIAM B. HILL, JR. 354725
Senior Assistant Attorney General

Please serve:

SUSAN V. BOLEYN
132 State Judicial Building
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3397

CERTIFICATE OF SERVICE

I, SUSAN V. BOLEYN, a member of the bar of the Suprme Court of the United States and counsel of record for the respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this brief in oppositionfor Respondent upon the Petitioner by depositing copies of same in the United States mail with proper address and adequate postage to:

Michael L. Rugen
Christopher M. Patti
44 Montgomery Street
San Francisco, California 94104

Mr. Robert T. Ries
Andrew W. Char
333 Market Street
San Francisco, California 94105

Mr. John C. Boger
James S. Liebman
99 Hudson Street
New York, New York 10013

Mr. Robert Weisberg
Stanford Law School
Stanford, California 94305

This 1st day of November, 1985.

Susan V. Boleyn

SUSAN V. BOLEYN
Assistant Attorney General